

Testimony on the U.S.-India Nuclear Deal

By

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Mr. Chairman:

My name is Leonard Weiss. I am a researcher and writer on energy and nuclear nonproliferation matters, and a consultant to the Center for Global Security Research at the Lawrence Livermore National Laboratory. My testimony is on behalf only of myself and no client, organization, or institution.

A Bit of Legislative History

For over twenty years I was Senator John H. Glenn's Governmental Affairs Committee Staff Director, first on the Subcommittee on Energy and Nuclear Proliferation, and then on the full Committee itself. I wrote nonproliferation legislation for Senator Glenn (D-Ohio) that was incorporated into a Glenn-Percy bill during the 95th Congress. That bill, after substantial rewriting, additions, and modifications resulting from negotiations I led with the Carter Administration in the summer of 1977, subsequent markups by three Senate committees and a number of Floor amendments, became the Nuclear Nonproliferation Act of 1978. The House, which had earlier passed its own nonproliferation bill sponsored by Representative Bingham (D-NY), accepted the Senate version, and President Carter signed the bill into law on March 10, 1978. This law, part of which amends the Atomic Energy Act, was a poster child for bipartisan support and cooperation in both houses. It is the part of the Atomic Energy Act amended by this law which the Bush Administration seeks to change in connection with the proposed U.S.-India nuclear deal.

India Needs Energy Assistance

Mr. Chairman, I am a strong proponent of improving U.S.-India bilateral relations. India is a democratic country with one sixth of the world's population, and its increasing stature and influence in world affairs should not only be recognized, but welcomed. It is also a rapidly developing country with an increasing appetite for energy resources, including electrical power, to feed its growing economy. And India can use U.S. help in this respect. Whether nuclear energy should be the first choice in helping India meet its energy needs is questionable, and I have presented an alternative in an article in the current issue of the Bulletin of Atomic Scientists that I request be included in the record as part of my testimony. But if one is going to have a nuclear agreement, it ought **not** to

be one that carries considerable risks and is virtually devoid of significant nonproliferation benefits.

The Proposed Deal Weakens the Nonproliferation Regime

Mr. Chairman, in the wake of 9/11, nonproliferation has to be seen as a critical element of counter-terrorism. Maintaining an international regime that has kept the spread of nuclear weapons to manageable proportions thus far and has promoted the physical security of weapon-useable materials around the world is a key aspect of U.S. national security. A nuclear deal with India that would be seen by the state-parties to the Nuclear Nonproliferation Treaty (NPT) as strengthening the regime would be a positive contribution to world stability and U.S. national security. Such a nuclear deal would have required India, at least, to cap its production of weapon materials. The proposed nuclear deal does not.

By requiring no concessions by India in the production of nuclear weapons, the proposed nuclear deal devalues the commitments made by the 183 non-weapon state-parties to the NPT, some of whom are sure to question whether it was necessary for them to forego the acquisition of nuclear weapons in order to receive nuclear technology assistance. It may make it more difficult to dissuade some countries from producing their own special nuclear materials that terrorists would like to buy or steal. It will surely make it more difficult to get other countries to sign and/or ratify the Additional Protocol that gives the IAEA the ability to apply more intrusive nuclear safeguards measures. It makes cooperation more difficult in barring nuclear trade with or imposing sanctions on countries that have suspicious programs or a record of bad nuclear behavior. And it arguably could put the United States in the position of violating its Article I commitments under the NPT if future nuclear fuel sales contribute to an enhanced rate of weapon production by India through the transfer of indigenous uranium from India's civilian program to its military program.

India Should Stop Fissile material Production

Mr. Chairman, there is no question that the proposed deal is a boost to India's prestige and gives India de facto recognition as a nuclear weapon state but without status as an NPT party. In return for this, the international community and the United States ought to receive more from India than a continuation of policies adopted prior to the Joint Statement of 2005 along with a separation agreement that is a fig leaf covering an expanded Indian nuclear weapons production capacity. India would not even agree to put its fast breeder program under safeguards, a program that will ultimately enable the production of dozens of nuclear weapons each year. It is not only in Russia that we need to be concerned about theft or sale of nuclear weapon materials. Additional production of nuclear weapon materials in South Asia adds to the risk of nuclear terrorism. India and Pakistan came close to nuclear war at the end of 2001 as a result of a jihadist attack on the Indian parliament. Some knowledgeable observers have suggested that there may be groups of jihadists in Kashmir and elsewhere in South Asia who may see nuclear war

between India and Pakistan as being beneficial to the jihadist cause. Is that the kind of situation where we should be encouraging more production of nuclear weapon materials?

If India wants to be treated as a nuclear weapon state, it should be willing to do what all the other recognized weapon states have agreed to do – stop the production of new fissile material for weapons and sign a comprehensive test ban. References to India's willingness to work toward a Fissile Material Cutoff Treaty within the UN Conference on Disarmament (CD) are disingenuous. The CD works by consensus and has been tied up for years without making any progress on the issue. India should be willing to make a commitment outside the CD. It is likely that such a commitment could be accomplished jointly with Pakistan and China with the U.S. and other countries assisting. That, along with a real test ban commitment would give a boost to nonproliferation efforts and would justify a U.S.-India nuclear agreement. The Administration claims that, even without these conditions, the deal will enhance nonproliferation efforts and strengthen the international nonproliferation regime. They have offered no evidence in support of this claim. Indeed, the legislation they have proposed in connection with the nuclear deal would, if enacted, do grave harm to the regime.

Proposed Changes to Current Law That Prevent Sanctions for Violations Should be Rejected

Under the Administration's bill, the President's issuance of a set of determinations regarding actions by India triggers changes or waivers of certain provisions of the Atomic Energy Act that would normally apply to an agreement with India. Only two changes to current law are needed in order for nuclear trade with India to occur. All the other waivers or changes are not required and should be removed from the bill.

The needed changes are simple. Change the date of effectiveness of Section 129(1)(A) of the Atomic Energy Act for India, and eliminate Section 129(1)(D) for India. Section 129(1)(A) prohibits nuclear trade with any country that, after the date of March 10, 1978, has detonated a nuclear explosive device. This date should be changed to the date of the last Indian nuclear test in 1998. Section 129(1)(D) prohibits nuclear trade with any country that has engaged in activities involving source or special nuclear material having direct significance for the manufacture or acquisition of nuclear explosive devices and has, in the President's judgment, failed to take sufficient steps to terminate such activities. India's nuclear weapon program requires the elimination of this provision for India if nuclear trade with India is to proceed.

Instead of using a scalpel to accomplish these changes, the Administration has chosen to completely eliminate Section 129 for India. This is not only unnecessary, it is absolutely harmful. Section 129 provides for sanctions for bad nuclear behavior. Its removal for India would mean, in particular, that nuclear trade could continue even if India abandons its current voluntary testing moratorium and sets off a nuclear explosion; terminates or violates a nuclear safeguards agreement with the IAEA; violates an agreement with the United States; transfers reprocessing technology to another country; or assists another country in the manufacture or acquisition of nuclear weapons. This provision of the

Administration bill is not only a direct gift to India; it is an indirect gift to Iran, to Pakistan, and to all other real or potential proliferators who will point to this provision as justification for their own transgressions. The authorization given by the Administration's bill to the President to waive the sanction provisions of Section 129 if he makes certain determinations should be eliminated by Congress if and when a markup of this legislation occurs.

Current Congressional Review Procedures Should be Preserved

Another unneeded and pernicious change triggered by the Presidential determinations is that involving Congressional review of the Section 123 agreement and future oversight of the agreement if approved.

Under current law, if an agreement for cooperation is sent up to Congress and satisfies all the requirements of Section 123, including full scope safeguards, U.S. consent rights over the disposition and reprocessing of U.S.-origin spent fuel and the replication of transferred technology, etc., then the agreement sits before Congress for a maximum of 90 days, and if there is no vote disapproving the agreement, it goes into effect. It was felt at the time this was written that a cooperating partner meeting all the requirements of Section 123 and given a clean bill of nonproliferation health by the administration should have an expectation of approval of its nuclear agreement with the United States; so Congress made it hard to reject such an agreement by requiring the rejection to pass as a joint resolution of disapproval. Of course, the President would veto the resolution, thereby requiring a 2/3 vote of both houses to reject the agreement.

The law does provide for the President to send up a nuclear agreement that is missing one or more provisions of Section 123. If such an agreement is sent up by the President with a waiver of one or more requirements under Section 123, e.g., no full scope safeguards, the law provides that such an agreement cannot go into effect unless there is a favorable majority vote by Congress on a joint resolution of approval. Thus, a majority of either house can reject such an agreement. This was done because it was felt that an agreement missing provisions of Section 123 should be rare, and therefore requires special consideration by Congress.

Under the Administration bill, the U.S.-Indian agreement for cooperation, whenever it comes up for Congressional review, will be treated as if it met all the requirements of Section 123. Accordingly, the agreement could go into effect without a vote if no resolution of disapproval was filed, or if such a resolution was introduced and passed, it would ultimately require a 2/3 vote to reject it. That is, the Administration wants this controversial nuclear agreement, the first in history with a non-signer of the NPT that possesses nuclear weapons, to be treated as if there is no controversy about it; and to allow 1/3+1 of the members present and voting in either house to prevent the agreement from being rejected. It is a prime example of Executive Branch distrust of Congressional judgment and Congressional prerogatives under current law. The Committee should amend the Administration's bill to restore the original method of Congressional review.

But that is not the only place where the Administration seeks to reduce Congressional prerogatives under current law. The legislation also authorizes the removal of Section 128 for India. Because India does not meet the full scope safeguards criterion, Section 128 requires that the first nuclear export license applied for under the approved agreement for cooperation be subject to Congressional review for a period of sixty days of continuous session and that the first license each year thereafter be subject to similar Congressional review. This was put into the law as a mechanism to ensure ongoing Congressional oversight of an unusual agreement. By removing Section 128, the Administration removes this trigger for such oversight.

Congress Should Review the Section 123 Agreement and Safeguards Agreement Prior to Acting on the Legislation

Restoring Congressional prerogatives and reestablishing the possibility of sanctions for bad behavior are only two of the issues that Congress must consider in contemplating a markup of the Administration's legislation. By asking the Congress for an early markup of its legislation, the Administration is saying, in effect, that the Presidential determinations are an adequate substitute for the Section 123 agreement and the India-IAEA safeguards agreement in judging whether there are sufficient nonproliferation benefits and protections from this deal in order to move forward with it. It is no secret that the Administration will tout a positive Congressional vote as a preemptive endorsement of the forthcoming agreement for cooperation and will sell it as such to the Nuclear Suppliers Group (NSG), a 45 nation group originally set up by the United States to establish international guidelines for nuclear trade. This group, which operates by consensus, will have to change its rule on full scope safeguards in order to allow nuclear trade with India. It is ironic that the U.S. spent years persuading the Nuclear Suppliers Group to adopt full scope safeguards as an export criterion, and is now trying to persuade it to drop that criterion for India. One can be sure that if that happens, China will seek to provide nuclear help to Pakistan under the same conditions.

Accordingly, the passage of this legislation alone could have profound implications for the nonproliferation regime unless there are mitigating provisions in the Section 123 agreement for cooperation that would make clear that the agreement is positive for nonproliferation. The current Presidential determinations are insufficient to reach the latter conclusion.

What needs to be added to this legislation? That depends on what is going to be contained in the Section 123 Agreement for Cooperation, which is under negotiation. For example, the agreement should give the U.S. consent rights over the reprocessing of U.S.-origin spent fuel, nuclear enrichment of U.S. fuel, and replication of transferred technology. The U.S. should be able to demand the return of transferred equipment and materials in the event of an Indian violation of the agreement. We don't know at this point whether these provisions are in the agreement.

There are also safeguards issues that need to be explored. India has averred that it will only accept safeguards in perpetuity (a standard IAEA requirement in safeguards

agreements with countries having both safeguarded and unsafeguarded facilities) if it receives nuclear fuel guarantees in perpetuity. How such guarantees could be given is unclear. Would such a guarantee be applicable if India violated its commitments under the U.S.-India agreement? Only by examining the India-IAEA safeguards agreement, which is also under negotiation, can these questions be cleared up. Other safeguards questions involve the separation agreement. Any reactor producing electricity for India's national grid should carry safeguards; otherwise there is no real separation between civilian and military reactors. But the Indians insist that only they will determine which facilities are to be considered civilian and which military. This insistence raises another issue.

The CIRUS reactor, a research reactor provided to India by Canada in 1956 under a contract requiring "peaceful use", was used by India to produce plutonium for its 1974 nuclear explosion and undoubtedly its 1998 tests as well. U.S. heavy water was sold to India in 1956 for insertion into the CIRUS reactor, and also carried a "peaceful use" contractual requirement. When India exploded its device in 1974, it claimed that the explosion was "peaceful" and therefore met the requirements of the contracts with the U.S. and Canada. But four years earlier, in 1970, the U.S. had sent the Indian Atomic Energy Commission an aide-memoir that was declassified at Senator Glenn's request in 1980, stating that using the U.S.-provided heavy water for nuclear explosive purposes would be a violation of the terms of sale. India ignored the message. In an October 10, 1997 appearance before the Press Trust of India, Raj Ramanna, the former director of India's nuclear program, said: "The Pokhran test was a bomb, I can tell you now. An explosion is an explosion, a gun is a gun, whether you shoot at someone or shoot at the ground. I just want to make it clear that the test was not all that peaceful."

My own calculations show that, taking natural losses into account, some U.S. heavy water was probably still in the CIRUS reactor as late as 1998. CIRUS has provided as much as 30% of the plutonium for India's nuclear weapon program, and is listed as a military facility under the separation plan. It is a slap in the face to both the U.S. and Canada, neither of which has registered a complaint except for Canada's stated desire that CIRUS should be moved to the civilian side.

To prevent this kind of semantic flim-flam from happening again, the U.S.-India agreement for cooperation should be explicit in requiring that no transferred materials, equipment or technology be used for any nuclear explosive purpose.

It is evident that marking up the Administration's legislation without having the Section 123 agreement and the safeguards agreement in hand is buying the proverbial "pig-in-a-poke". The Congress should wait until these agreements are in hand and examined before proceeding further.

A Modest Proposal for Congressional Action that Guarantees Nuclear Assistance to India and Benefits to the Nonproliferation Regime

Mr. Chairman, I know that there are many members in this body and in the other body that want to vote for a nuclear energy agreement with India, but at the same time are troubled by this agreement and want to show their support for nonproliferation. The Indians have stated in various forums that they will not agree to a nuclear deal that requires them to cap their nuclear weapons program. In light of what other weapon states are doing, this is not a position that ought to be tolerated if it is absolute. But it is possible that what the Indians mean by this is that they need more time to reach their goal of a “credible minimum deterrent”. One way of giving them the benefit of the doubt is to approve a nuclear agreement with India that contains all the appropriate elements of Sections 123 and 129, along with additions outlined in my testimony and that of others, but condition the issuance of export licenses under the agreement on India’s cessation of production of fissile material for weapons, continued cessation of nuclear testing, and a commitment to engage in good faith negotiations toward nuclear disarmament with other states having such weapons. (The latter commitment is a requirement of weapon states under Article VI of the NPT). That would send a signal that the United States will begin approving license applications for nuclear cooperation with India with no delay as soon as India has made the same commitments as the five officially recognized weapon states under the NPT. Under these conditions, Mr. Chairman, a nuclear agreement with India would be a contribution to nonproliferation.

Anything less would be a step backward by the United States from its half century of leadership in trying to prevent the spread of nuclear weapons.

Thank you, Mr. Chairman. I am ready to answer any questions the committee may have.